Returning Employees with Disabilities to Work Following Leave:

EMPLOYER RESPONSIBILITIES

presented by

The Department of Fair Employment & Housing,

an Agency of the State of California

www.dfeh.ca.gov

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I. Introduction

California employers have an affirmative legal obligation to strive to return an employee with a disability to work after that individual has taken a protected leave. Too often employers do not understand their responsibilities under the California Fair Employment and Housing Act (FEHA), the federal Americans with Disabilities Act (ADA), and/or the California Family Rights Act (CFRA), which results in a violation of the employee's rights and a complaint being lodged with the Department of Fair Employment and Housing (DFEH) or Equal Employment Opportunity Commission (EEOC).

The purpose of this material is to help employers and employees understand their rights and responsibilities under controlling state and federal law in order to assure compliance.[1]

II. The Basics

A. Employers' Obligations under the FEHA

The FEHA is set forth at California Government Code section 12900, et seq.

It prohibits discrimination because of an employee's physical or mental disability or medical condition, as those terms as defined therein.[2]

In 2000, the California Legislature enacted the Prudence K. Poppink Act which made significant changes to and clarified California's laws prohibiting discrimination as they pertain to persons with disabilities, effective January 1, 2001. The California Legislature reaffirmed its commitment to the prevention and eradication of workplace discrimination:

> (a) The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (Public Law 101-336). Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.

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[1] A discussion of Workers' Compensation is beyond the scope of this presentation, but employers and employees should bear in mind that they may have specific rights and responsibilities under that statutory framework, as well.

[2] Government Code section 12940, subdivision (a).

(b) The law of this state contains broad definitions of physical disability, mental disability, and medical condition. It is the intent of the Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.

(c) Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease.[3]

In addition, the Legislature has determined that the definitions of "physical disability" and "mental disability" under the law of this state require a "limitation" upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a "substantial limitation." This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, "working" is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.

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[3] Other disabilities include, but are not limited to back conditions that impair working or other major life activities (See *Sargent v. Litton Systems, Inc*. (1994) 841 F.Supp. 956, 960 [cervical spondylitis, a back condition, made it painful for plaintiff to do any heavy lifting, turn her head upward or to the side for more than a brief interval, or drive a car for over 20 minutes]); polio (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 354 [plaintiff substantially impaired in her ability to move around her worksite and to transport herself from her car to her work station]); hypertension and high blood pressure (*American Nat'l Ins. Co. v. Fair Employment & Housing Comm'n* (1982) 32 Cal.3d 603, 610); and hypersensitivity to tobacco smoke (*County of Fresno v. Fair Employment & Housing Comm'n* (1991) 226 Cal.App.3d 1541, 1548 [interferes with major life activity of breathing].)

(e) The Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation, as this requirement has been articulated by the Equal Employment Opportunity Commission in its interpretive guidance of the Americans with Disabilities Act of 1990.[4]

The FEHA's prohibition against disability discrimination applies to any person regularly employing five (5) or more persons, except a religious association or corporation not organized for private profit.[5] Despite the exclusion for religious nonprofit organizations, the term "employer" does include health care facilities operated by religious entities (except for employees performing religious duties) and educational institutions operated by religious entities.[6]

Additionally, the FEHA requires covered employers to:

- Provide reasonable accommodation for those job applicants and employees who are unable to perform the essential functions of their job because of disability.[7]
- Engage in a timely, good faith interactive process with applicants or employees to determine effective reasonable accommodations.[8]

The obligation to engage in the interactive process for the purpose of determining if a reasonable accommodation can be provided arises when the employer becomes aware – by any means -- of the employee's need for accommodation.

1. "Disability" and "Medical Condition" Defined

"Physical disability" is defined in the FEHA as any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more body systems (i.e., neurological, immunological, musculoskeletal, special sense organs, respiratory, speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, or endocrine) and limits a major life activity.[9]

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[4] Government Code section 12926.1.
[5] Government Code section 12926, subdivision (d).
[6] Government Code section 12926.2, subdivisions (c), (f)(2).
[7] Government Code section 12940, subdivision (m).
[8] Government Code section 12940, subdivision (n).
[9] Government Code section 12926, subdivision (k).

"Mental disability" includes, but is not limited to, having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity.[10]

Physical and mental disabilities also include:

(1) Any other health impairment, mental or psychological disorder or condition that requires special education or related services.

(2) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, health impairment, or mental or psychological disorder or condition that is known to the employer.

(3) Being regarded or treated by the employer as having, or having had, any physical or mental condition that makes achievement of a major life activity difficult.[11]

(4) Being regarded or treated by the employer as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, health impairment, or mental or psychological disorder or condition that has no present disabling effect but may become a physical or mental disability in the future.[12]

The definitions of physical and mental disability set forth in the FEHA do not include "sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances of other drugs."[13]

The FEHA defines a "medical condition" as a health impairment related to a diagnosis of cancer (or a record or history of cancer) ***or*** a genetic characteristic known to statistically increase the risk of development of a disease or disorder, but which is not presently associated with any symptoms of the disease or disorder.[14] For example, women who carry a gene known to statistically increase the risk of developing breast cancer are subject to the FEHA's

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[10] Government Code section 12926, subdivision (i).
[11] Commonly referred to as "perceived" disabilities.
[12] Government Code section 12926, subdivisions (i), (k).)
[13] Government Code section 12926, subdivisions (i)(5), (k)(6).
[14] Government Code section 12926, subdivision (h).

protections even though they have not been diagnosed with breast cancer.[15]

Whether a disability or medical condition "limits" a major life activity is determined *without* regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.[16] A disability or medical condition "limits" a major life activity if it makes the achievement of the life activity difficult.[17]

"Major life activities" include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.[18]

To verify that an employee or applicant is a person with a disability, an employer may only request medical records and information *directly related* to the disability in question and need for reasonable accommodation. An applicant or employee has the right to submit a report from an independent medical examiner before disqualification from employment occurs. Such a report, along with any other medical information gathered, must be treated as a confidential medical record and the employee's privacy appropriately safeguarded. The employee's supervisor or manager must be informed of the employee's restrictions for the purpose of assuring that the accommodation is maintained, as well as for safety reasons such as when emergency treatment might be required.[19]

2. The Duty to Grant Reasonable Accommodation

Once it has been established that an applicant or employee is a person with a disability, the employer must grant the employee a reasonable accommodation unless the employer can demonstrate that to do so would impose an undue hardship upon its business

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[15] It is an unlawful employment practice for an employer to subject any applicant or employee to a test for the presence of a genetic characteristic. (Gov. Code, § 12940, subd. (o).)

[16] Government Code section 12926, subdivisions (i)(1)(A), (k)(1)(B)(i).

[17] Government Code section 12926, subdivisions (i)(1)(B), (k)(1)(B)(ii).

[18] California Code of Regulations., Title 2, section 7293.6, subdivision (e)(1)(A)(2)(a).

[19] California Code of Regulations, Title 2, section 7294.0, subdivision (d).

operation.[20] Note that the employer bears the burden of establishing the undue hardship.

The employer must engage in a timely, good faith, interactive process with the job applicant or employees to establish an effective reasonable accommodation once the job applicant or employee's need for accommodation becomes known to the employer.[21] The good faith, interactive process can best be described as a dialogue, discussion or other form of meaningful communication between the employer and employee.

If no reasonable accommodation can be provided that will enable an employee to perform the essential functions of his/her position, or if the employee cannot perform the essential functions of his or her position even after a reasonable accommodation has been established, reassignment to a vacant position for which the employee is qualified is one solution that constitutes a reasonable accommodation.[22] The employer is, of course, in a better position than the employee to know what jobs within the organization are or will soon become available. Therefore, it is the *employer's* duty to ascertain and offer suitable alternate position(s) as a form of accommodation.[23] Merely instructing the employee to check job postings for available positions and submit applications for those positions neither satisfies the employer's duty to engage in the interactive process nor constitutes a reasonable accommodation.

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[20] Government Code section 12940, subdivision (m); California Code of Regulations, Title 2, section 7293.9.) California employers have an affirmative duty to provide a reasonable accommodation to an employee with a disability. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 949-950 [Employer had a duty to take affirmative steps to inform employee with a disability about other job opportunities within the company and to determine whether employee was qualified for those positions]; see also *Sargent v. Litton Systems, Inc.* (1994) 841 F.Supp. 956, 962 [employer had duty under FEHA to make reasonable accommodations to enable employee with a disability to get to work].)

[21] Government Code section 12940, subdivision (n).

[22] Government Code section 12926, subdivision (n)(2); California Code of Regulations, Title 2, section 7293.9, subdivision (a)(2). The employer has no obligation to create a position for the employee in need of accommodation nor is the employer expected to place the employee in a position for which he/she is not qualified or displace another employee in order to provide accommodation.

[23] *Spitzer v. The Good Guys, Inc*. (2000) 80 Cal.4th 1376, 1389-1390.

The FEHA also entitles an employee with a disability to "preferential consideration" in reassignment or transfer to a vacant position, however, the employer has no obligation to violate the terms of an applicable collective bargaining agreement.[24] The employer is not required to create a new job/position in order to accommodate an employee with a disability.[25]

3. Essential Job Functions

The "essential functions" of a particular job are those "fundamental job duties of the employment position that the individual with a disability holds or desires. Essential functions do not include the marginal functions of the employment position."[26]

To determine whether a job function is essential, the following factors are evaluated:

- Whether the position exists to perform that function;
- Whether only a limited number of employees are available to whom the job function can be distributed;

or

- Whether the function is highly specialized and the incumbent was hired for his or her expertise or ability to perform that particular function.[27]

Evidence of whether a particular function is essential includes, but is not limited to:

- The employer's judgment as to which functions are essential;
- Written job descriptions prepared before advertising or interviewing applicants for the position;
- The amount of time spent on the job performing the function;
- The consequence of not requiring the incumbent to perform the function;
- The terms of a collective bargaining agreement, if any;
- The work experiences of past incumbents in the job;

and

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[24] *Jensen v. Wells Fargo Bank*, *supra*, 85 Cal.App.4th at 265.
[25] *Watkins v. Ameripride Services* (9th Cir. 2004) 375 F.3d 821, 828.
[26] Government Code section 12926, subdivision (f).
[27] Government Code section 12926, subdivision (f)(1); California Code of Regulations, Title 2, section 7293.8, subdivision (g)(1).

- The current work experiences of incumbents in similar jobs.[28]

Once the essential functions of the position have been identified, the focus of the good faith, timely interactive process is the determination of effective reasonable accommodation(s) that will allow the employee to perform those functions. Participation in the interactive process is a mutual obligation, i.e., the employee must cooperate with the employer by participating in the process and responding to the employer's appropriate requests for information and guidance on whether or not a particular accommodation will allow the employee to perform the essential functions of his/her position.

An employee is entitled only to a "reasonable" accommodation, not an ideal or his/her preferred accommodation. Therefore, if the employer offers the employee a particular form of accommodation that will allow him/her to perform the essential functions of his/her position, the employee must accept the offered accommodation even though it may not be the form of accommodation the employee desires most.

4. Examples of Reasonable Accommodation

The number of possible reasonable accommodations that may be granted by an employer is infinite, limited only by the facts of the particular situation and the creativity of the employer and employee as they engage in the interactive process. A reasonable accommodation is *any* effective measure that enables an applicant or employee with a disability to perform the essential functions of his/her position.

Forms of reasonable accommodation include, but are not limited to:[29]

- Making an existing facility readily accessible to, and usable by, an individual with a disability;

- Acquisition or modification of tools, equipment, devices, or furnishings (e.g., providing a keyboard rest to a person with

[28] Government Code section 12926, subdivision (f)(2); California Code of Regulations, Title 2, section 7293.8, subdivision (g)(2).

[29] Government Code section 12926, subdivision (n); California Code Regulations, Title 2, section 7293.9, subdivision (a).

carpal tunnel syndrome, providing an ergonomically appropriate chair to an individual with a disability related to the spine/back);

- Adjustment or modification of examinations;
- Adjustment or modification of training materials;
- Adjustment or modification of workplace policies, procedures, or regulations, including adjustments to a policy governing leaves of absence;
- Altering when or how an essential job function is performed;
- Adjusting the employee's work schedule;
- Paid or unpaid leave;[30]

  Employers frequently overlook the fact that a finite leave of absence may be an appropriate form of reasonable accommodation. It must be anticipated, at the time of granting the leave of absence, that the employee will resume his/her duties at the conclusion of the leave period.[31]

- Participation in an alcohol or drug rehabilitation program;

  A leave of absence in order to voluntarily enter and participate in an alcohol or drug rehabilitation program may also constitute a reasonable accommodation.[32] The leave may be taken as a block of time or intermittently.

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[30] The employee may also be entitled to leave in accordance with the California Family Rights Act and/or federal Family and Medical Leave Act. (See discussion below.)

[31] See *Jensen v. Wells Fargo Bank* (2000) 85 Cal.4th 245, 263 in which the court noted that "[h]olding a job open for an employee with a disability who needs time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future." See also *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.4th 215, 226-227 [reasonable accommodation does not require the employer to wait indefinitely for an employee's medical condition to be corrected].

[32] Labor Code section 1025 provides that California employers with 25 or more employees must provide such reasonable accommodate unless to do so would create an undue hardship for the employee. Recall, however, that the FEHA applies to employers of five (5) or more persons. (See also California Labor Code sections 1026 – 1028.)

- Reassignment to a vacant position;

  If an employee with a disability can no longer perform the essential functions of his/her position, transfer or reassignment to a vacant position may constitute a reasonable accommodation, even if it requires the employee to accept a lower rate of pay.[33] The employer is not, however, required to create a position in order to provide a reasonable accommodation.

- Provision of a qualified reader

- Provision of a qualified interpreter

- Assignment to a new or different supervisor;[34]

- Telecommuting or working from home.

5. The Interactive Process

According to the EEOC, "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process" that involves both the employer and the individual with a disability. Once an individual with a disability has requested a reasonable accommodation or the employer has otherwise become aware of the employee's need for accommodation, the employer, using a "problem solving approach," must take action, as follows:

- Analyze the particular job/position involved to determine its purpose and essential functions;

- Consult with the employee or job applicant to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

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[33] *Hanson v. Lucky Stores, Inc.,* supra, 74 Cal.4th 227 [The employer reasonably accommodated employee with disability who could no longer perform essential functions of former job by offering alternate vacant position paying 50% of former pay rate without benefits].

[34] To date, no court has ruled that an employer must provide an employee with a new or different supervisor as a form of reasonable accommodation, although the FEHA would not prohibit an employer from voluntarily doing so. It may be necessary, however, for an employer to modify or revise supervisory methods employed.

- In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position;

and

- Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.[35]

A failure to engage in the interactive process constitutes a *separate violation* of the FEHA.

6. Exceptions to Employer's Obligation to Provide a Reasonable Accommodation

The employer is legally excused from granting a reasonable accommodation if it can establish that to do so would impose an undue hardship upon the employer or that the employee is unable perform the essential functions of his/her job even with an accommodation.[36] Additionally, the employer will not be required to employ an individual with a disability who is unable, even with accommodation, to perform the essential functions of the position in a manner that will not endanger his/her own or the health and safety of other persons.[37] An employer can also exclude an individual with a disability from employment if the employer can prove the existence of a bona fide occupational requirement (BFOQ)[38] or the employer is required by a state or federal statute or

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[35] 29 Code Federal Regulations section 1630, Appendix section 1630.9, p. 364.

[36] Government Code section 12940, subdivision (m); California Code of Regulations, Title 2, sections 7293.8, subdivision (b), 7293.9.

[37] California Code of Regulations, Title 2, section 7293.8, subdivisions (c), (d). "However, it is no defense to assert that an individual with a disability has a condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not immediately endanger the individual with a disability or others, and the individual is able to safely perform the job over a reasonable length of time. A 'reasonable length of time' is to be determined on an individual basis." (California Code of Regulations, Title 2, section 7293.8, subdivision (e).)

[38] Government Code section 12940, subdivision (a).

valid order issued by a court of law to bar the employee or job applicant with a disability from the job/position in question.[39]

At all times, the employer bears the burden of demonstrating that it is not legally required to provide an accommodation.[40]

"Undue hardship" is defined as "an action requiring significant difficulty or expense, when considered in light of" specific factors:

- The nature and cost of the accommodation needed;
- The overall financial resources of the facilities involved in providing the reasonable accommodation, the number of persons employed at the facility, and the effect on expenses and resources or the impact on the operation of the facility;
- The overall financial resources of the covered entity, the overall size of the business with respect to the number of employees, and the number, type and location of the covered entity's facilities;
- The type of operations of the covered entity, including the composition, structure, and functions of its workforce;

and

- The geographic separateness, administrative, or fiscal relationship of the facility or facilities.[41]

8. Traps for the Unwary Employer: Distinctions between the FEHA and ADA

The FEHA's prohibitions against disability discrimination are independent of and, in many ways, broader than those provided by the ADA.[42] California employers have an affirmative obligation to comply with the FEHA. Reliance solely upon and application of the ADA's provisions can result in violation(s) of the FEHA.

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[39] California Code of Regulations, Title 2, section 7286.7, subdivision (f).
[40] California Code of Regulations, Title 2, sections 7293.8, subdivision (b), 7293.9.
[41] Government Code section 12926, subdivision (s); California Code of Regulations, Title 2, section 7293.9, subdivision (b).
[42] Government Code section 12926.1.

a. Jurisdictional limits

The ADA applies only to employers with fifteen (15) or more employees.[43] As noted above, the FEHA's prohibition on discrimination because of physical or mental disability or medical condition applies to California employers with five (5) or more employee, resulting in coverage for a significantly larger number of California employers, employees and job applicants.[44]

With regard to claims of workplace harassment because of physical or mental disability or medical condition, the FEHA applies to any person regularly employing one (1) or more employees or regularly receiving the services of one (1) or more independent contractors.[45] Additionally, *any* person who engages in workplace harassment of another individual may be held personally liable for his/her conduct irrespective of whether or not the harasser is a supervisorial or managerial employee, or whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.[46]

b. "Limitation" of a major life activity

The ADA only applies to physical or mental conditions that "substantially limit" a major life activity.[47]

The FEHA requires only that the disability "limit" a major life activity.[48] The distinction is extremely important and brings within the FEHA's protection many individuals with disabilities who would not be deemed under the ADA to have a disability.[49]

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[43] 42 U.S.C. § 12112, subd. (a).
[44] Government Code section 12926, subdivision (d).

[46] Government Code section 12940, subdivision (j)(3).
[47] 42 U.S.C. § 12102 (2).
[48] Government Code section 12926, subdivision (i)(1)(A), (k)(1)(B)(ii).
[49] "This distinction is intended to result in broader coverage under the law of this state than under that federal Act." (Government Code section 12926.1, subdivisions (c), (d)(2).) See *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1030-1031 [plaintiff admitted his back condition did not "substantially limit" his ability to work but claimed some limit on ability to perform major life activities].

c. Working: A Major Life Activity

Under the ADA, an employee who cannot perform the job requirements of a specific job but can work in a different position is not deemed substantially limited in the major life activity of working.

In California, however, "working" is a major life activity, regardless of whether the employee cannot perform "a particular employment or a class or broad range of employments."[50]

d. Mitigating Measures

Mitigating or corrective measures are relevant to a determination of whether a condition is considered to be disabling under the ADA.

In contrast, under the FEHA, whether a physical or mental disability limits a major life activity is determined "without respect to any mitigating measures" unless the measure itself limits a major life activity."[51] Mitigating measures include, but are not limited to medications, assistive devices (e.g., hearing aids), prosthetics or reasonable accommodations.

e. The Interactive Process

Courts interpreting the ADA characterize a failure to engage in the interactive process as substantial evidence of an unlawful failure to accommodate, rather than a separate violation of that statute.

Under the FEHA, a failure to engage in the interactive process is a separate and distinct violation of the FEHA.

f. Qualified for the Position

Under the ADA, the individual with a disability bears the burden of establishing that he/she is "qualified" for the position, i.e., that he or she can perform the essential functions of the position with or without reasonable accommodation.[52]

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[50] Government Code section 12926.1, subdivision (c).
[51] Government Code section 12926.1, subdivision (c).
[52] 42 U.S.C. § 12111 (8).

The FEHA places the burden to prove that the employee cannot perform the job's essential functions, with or without reasonable accommodation upon the employer.[53]

B. The California Family Rights Act (CFRA)

The CFRA guarantees to eligible California employees the right to take family care and medical leave and, absent certain specified circumstances, resume their employment at the conclusion of the leave. It is an unlawful employment practice for a covered employer to deny an eligible employee a CFRA-qualifying leave.[54]

Like the federal Family and Medical Leave Act (FMLA), the CFRA covers[55] employers who directly employ 50 or more part or full-time employees within 75 miles of the worksite where the employee requesting leave is employed.[56]

To be eligible for CFRA-qualifying leave, an employee must have completed at least 12 months (52 weeks) of service with the employer, at any time, as of the date the leave commences,[57] and have actually

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[53] California Code of Regulations, Title 2, section 7293.8; see also *Ackerman v. Western Elec. Co., Inc*. (9th Cir. 1988) 860 F.2d 1514, 1519.

[54] California Code of Regulations, Title 2, section 7297.1, subdivision (a).

[55] A "covered employer" under CFRA means "any person or individual engaged in any business or enterprise in California who directly employs 50 or more persons within any State of the United States, the District of Columbia, or any Territory or possession of the United States to perform services for a wage or salary. It also includes the State of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. There is no requirement that the 50 employees work at the same location or work full-time." (Cal. Code of Regs., tit. 2, § 7297.0, subd. (d).)

[56] Government Code section 12945.2, subdivision (b)(2); California Code of Regulations, Title 2, section 7297.0, subdivision (e)(3). The date for determining whether an employer employs at least 50 employees within 75 miles is when the employee gives notice of the need for leave. The 75-mile radius is measured in surface miles, using surface transportation, from the worksite where the employee requesting leave is employed. (Cal. Code of Regs., tit. 2, § 7297.0, subd. (e)(3).)

[57] An employee need not be employed for 12 consecutive months -- intermittent periods of work may be aggregated. An employee maintained on the payroll for any part of a week is deemed to have worked the entire week for purposes of computing the 12-month period. (Cal. Code of Regs., tit. 2, § 7297.0, subd. (e).) The term "maintained on the payroll for any part of a week'" includes employees on periods of paid or unpaid leave (e.g., sick,

worked[58] at least 1,250 hours during the 12-month period immediately preceding commencement of the leave.[59]

"Family care and medical leave," as that term is used in the CFRA, means any of the following:

1. Leave for reason of the birth of a child of the employee, the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, or the serious health condition of a child of the employee.

2. Leave to care for a parent or a spouse who has a serious health condition.

3. Leave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical condition.[60]

   The CFRA entitles eligible employees of covered employers to 12 unpaid workweeks of leave in a 12-month period.[61] The employer may choose any method the FMLA regulations allow to determine the 12-month period, provided the employer applies the selected method "consistently and uniformly to all employees."[62] The CFRA also allows leave to be taken on an intermittent or reduced schedule basis.[63] If an employee needs intermittent or reduced

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vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.).

[58] Within the meaning of the Fair Labor Standards Act, 29 CFR Part 785.

[59] Government Code section 12952.2, subdivision (a); California Code of Regulations, Title 2, section 7297.0, subdivision (e). The determination whether an employee has worked for 1,250 hours, as well as whether he or she has been employed for at least 12 months, must be made as of the date leave commences. (Cal. Code Regs. tit. 2, § 7297.0, subd. (e).) Paid time off due to vacation, holiday, illness, etc., does not count toward the 1250 "hours of service" requirement.

[60] Government Code section 12945.2, subdivision (c)(3)(A)-(C). Leave taken in accordance with the CFRA runs concurrently with, not in addition to, any leave period to which the employee would be entitled under FMLA, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions.

[61] Government Code section 12945.2, subdivision (a); California Code of Regulations, Title 2, section 7297.3, subdivision (a).

[62] California Code of Regulations, Title 2, section 7297.3, subdivision (b).

[63] California Code of Regulations, Title 2, section 7297.3, subdivision (c)(2).

leave due to foreseeable, planned medical treatment, an employer may require the employee to transfer temporarily to an available alternative position if the following conditions are met:

1. The alternative position better accommodates recurring periods of leave than the employee's regular position;
2. The employee is qualified for the alternative position; and
3. The alternative position has equivalent pay and benefits. (Equivalent duties are not required.)[64]

1. Leave for An Employee's Own "Serious Health Condition"

An employee may take a CFRA-qualifying leave of up to 12 weeks if he/she is suffering from a "serious health condition" which makes the employee unable to perform the essential function, as that term is defined in the FEHA and its implementing regulations, of his/her position.[65] A "serious health condition" is defined as "an illness, injury (including on-the-job injuries), impairment, or physical or mental condition that involves either:

(1) inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential health care facility, or

(2) continuing treatment or continuing supervision by a health care provider, as detailed in FMLA and its implementing regulations."[66]

Unlike the FMLA, the CFRA excludes pregnancy, childbirth, or related medical conditions from the definition of "serious health condition."[67]

An employee requesting CFRA leave should provide his/her employer with at least verbal notice sufficient to make his/her employer aware of his/her need for CFRA-qualifying leave. The anticipated timing and duration of the leave must be included in the

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[64] California Code of Regulations, Title 2, section 7297.3, subdivision (e)(1).
[65] Government Code section 12945.2, subdivision (c)(3)(C); California Code of Regulations, Title 2, section 7297.0, subdivisions (k), (o).
[66] Government Code section 12945.2, subdivision (c)(8); California Code of Regulations, Title 2, section 7297.0, subdivision (o).
[67] Government Code section 12945.2, subdivision (c)(3)(C); California Code of Regulations, Title 2, section 7297.0, subdivision (o). Pregnancy, childbirth, or related medical conditions are covered under the FEHA's pregnancy provisions (Gov. Code, § 12945, subd. (b)(2).)

employee's request, if known. The employee need not expressly assert his/her rights under CFRA or FMLA, or even *mention* CFRA or FMLA, in order to satisfy the notice requirement. However, the employee must state the reason the leave is needed, such as, for example, for the employee's own medical treatment. *An employee is not required to disclose the specific medical condition, diagnosis, or treatment for which he/she is requesting leave.* The employer may inquire further only to obtain the details of the leave and any additional information necessary to determine whether the leave is CFRA-qualifying.[68] It is the *employer's responsibility* to designate the leave as CFRA or CFRA/FMLA qualifying, based upon the information the employee provides, and to provide the employee timely notice of the designation.[69]

2. Certification of the Employee's Own "Serious Health Condition"

Like the FMLA, the CFRA permits the employer to request certification from the employee's treatment provider confirming his/her need for leave.[70] Unlike the FMLA, the CFRA prohibits employers from requiring disclosure of the specific serious health condition for which the employee requests leave.[71] It is sufficient if the certification states that, in the health care provider's opinion, the employee has a medical condition that constitutes a "serious health condition."[72] An employer may also require the certification to include:

(1) the date the serious health condition commenced (if known);

(2) the probable duration of the condition; and

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[68] California Code of Regulations, Title 2, section 7297.4, subdivision (a)(1).
[69] California Code of Regulations, Title 2, section 7297.4, subdivision (a)(1)(A).
[70] Government Code section 12945.2, subdivision (k)(1); California Code of Regulations, Title 2, section 7297.4, subdivision (b).
[71] California Code of Regulations, Title 2, section 7297.0, subdivisions (a)(1), (2). Under the FMLA, employers may require certification of the need for leave that discloses the nature of the employee's serious health condition. (29 CFR § 825.306 (b)(1).)
[72] Government Code section 12945.2, subdivision (k)(1); California Code of Regulations, Title 2, section 7297.0, subdivision (a)(2).

(3) a statement that the employee is unable to work or to perform one or more of the essential functions of the job, due to the serious health condition.[73]

As a condition of an employee's return to work following leave for his/her own serious health condition, the employer may also require that the employee's treatment provider certify that the employee is ready to resume his/her duties.[74] Such request is permissible only if an employer has a uniformly applied practice or policy of requiring certification that an employee is ready to resume work.[75]

3. Employee's Guaranteed Right to Reinstatement

Upon granting a CFRA leave, the employer must provide the employee with a guarantee of reinstatement to the same or comparable position at the conclusion of the leave (unless the employee is a "key employee" and reinstatement would result in substantial and grievous economic injury to the employer). The employer must put the guarantee in writing if the employee so requests.[76]The CFRA's reinstatement guarantee is subject to the same limitations as a FMLA leave:

- *Failure to provide return-to-work certification*: An employer may delay reinstatement where an employee has taken CFRA leave because of his/her own serious health condition and fails to provide certification, pursuant to the employee's request, indicating that he/she is medically able to return to work.[77]

- *Elimination of position*: Reinstatement may be denied if, but for the employee's exercise of his/her right to take CFRA-qualifying leave, he/she would not have been employed at the time reinstatement is requested, for instance, his/her position is eliminated).[78] The CFRA's guarantee of reinstatement does not

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[73] Government Code section 12945.2, subdivision (k)(1); California Code of Regulations, Title 2, section 7297.0, subdivision (a)(2).
[74] Government Code section 12945.2, subdivision (k)(4); California Code of Regulations, Title 2, section 7297.4, subdivision (b)(2)(E).
[75] Government Code section 12945.2, subdivision (k)(4); California Code of Regulations, Title 2, section 7297.4, subdivision (b)(2)(E).)
[76] Government Code section 12945.2, subdivision (a); California Code of Regulations, Title 2, section 7297.2, subdivisions (a), (c).
[77] California Code of Regulations, Title 2, section 7297.4, subdivision (b)(2)(E).
[78] California Code of Regulations, Title 2, section 7297.2, subdivision (c)(1).

preclude an employer from terminating an employee as part of a company-wide reduction in force.[79]

- *"Key employee" remaining on leave after notice*: Where an employee is a "key employee" (salaried employee among the highest paid 10 percent of employees within 75 miles of the worksite where the employee works) and reinstatement would result in substantial and grievous economic injury, reinstatement may be denied if the employer notifies the employee of the intent to refuse reinstatement at the time the employer determines the refusal is necessary. In any case in which the leave has already commenced, the employer must give the employee a reasonable opportunity to return to work following the notice.[80]

III. The Interrelationship between the Fair Employment and Housing Act and California Family Rights Act

Depending upon the nature and cause, an employee's condition may concurrently qualify as an occupational injury, a serious medical condition *and* a disability. As such, an employee may be protected simultaneously by the Workers' Compensation Act (WCA),[81] CFRA, and the FEHA's prohibitions on discrimination for the same injury or condition. Employers must evaluate each condition under all three acts, and follow the law that is most protective of the employee's rights. Absent a preemption or exclusivity provision, an employer must comply with the law that provides the employee the broadest protection.

A. WCA and the FEHA

Neither the exclusive remedy provisions of the WCA, nor the discrimination prohibition set forth in Labor Code section 132a preempt FEHA claims, even as to work-related disabilities.[82] In other words, a cause of action exists under the FEHA for disability discrimination even

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[79] *Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal.App.4th 934, 939-943 [upholding Cal. Code of Regs., tit. 2, § 7297.2, subd. (c)].

[80] Government Code, section 12945.2, subdivision (r)(1); California Code of Regulations, Title 2, section 7297.2, subdivision (c)(2).

[81] A complete discussion of the Workers' Compensation Act is beyond the scope of this presentation.

[82] *City of Moorpark v. Superior Court (Dillon)* (1998) 18 Cal.4th 1143, 1156 [disability discrimination is not a 'normal risk of the employment relationship,' and therefore workers' compensation is not the exclusive remedy for claims based on such discrimination; disabilities due to occupational injury or illness are covered by the FEHA].

if the disability is caused by an occupational injury or illness and the employee has filed a petition in accordance with Labor Code section 132a within a WCA proceeding.

Employers must analyze whether or not a condition which constitutes a "disability" for workers' compensation purposes also meets the definition of "disability" set forth in the FEHA. If the injured employee's condition qualifies as a disability under the FEHA, the employer *must* engage in a good faith interactive process with the employee to determine whether the employer can provide him/her a reasonable accommodation, including, without limitation, job modification or reassignment to a vacant position. In response to a claimed violation of the FEHA, an employer may not assert its compliance with the provisions of the WCA. Rather, an employer may only terminate an employee whose occupational injury also qualifies as a disability under the FEHA if it can demonstrate that no reasonable accommodation could be provided that would allow the employee to perform the essential functions of his/her position without endangering his/her own health and safety or the health and safety of the entity's other employees or that to provide an accommodation would impose an undue hardship upon the employer.

B. The FEHA and the CFRA

A "disability," as defined by the FEHA, may or may not also be deemed a "serious health condition" under the CFRA, and vice-versa. And employer must evaluate the employee's condition with reference to the definitions of both terms in order to properly understand its legal obligations and the employee's rights. For example, if an employee has a physical or mental "disability" within the meaning of the FEHA, the employer must consider whether a leave is required as a reasonable accommodation under the FEHA *irrespective of* whether the employee is also entitled to a protected leave pursuant to the CFRA. If leave is required under both the FEHA and the CFRA, and the employee has exhausted his/her CFRA leave entitlement, an employer may legally be required to provide an additional finite period of leave as a reasonable accommodation, unless the employer can demonstrate that the grant the leave would impose an undue hardship upon the employer's operation.

C. WCA and the CFRA

If an employee suffers a work-related injury that also meets the definition of a "serious health condition" for purposes of the CFRA, any CFRA-protected leave the employee takes will run concurrently with

the workers' compensation leave, so long as the employer has satisfied the CFRA's notice and designation requirements.[83]

An employer may not refuse to reinstate an employee to his/her own or a comparable position following CFRA-protected leave unless the employer can demonstrate that the employee would not have been employed on the date selected for return irrespective of having taken CFRA-qualifying leave. For example, if a company experiences downsizing or layoffs during an employee is on a CFRA-protected leave and can demonstrate that the employee would have been laid off or his/her position eliminated irrespective of his/her having taken leave, the employer will not be required to offer reinstatement to the employee at the conclusion of the leave.[84]

IV. Legal Redress for Violations of the FEHA by Employers

Any job applicant or employee who believes that he/she has been denied an employment opportunity or reasonable accommodation,[85] or otherwise been discriminated against because of his/her physical or mental disability or medical condition, should first seek resolution via his/her immediate supervisor, the employer's reasonable accommodation coordinator, human resources representative, equal employment opportunity (EEO) officer or other authorized individual.

If the matter remains unresolved, the job applicant or employee may contact the Department of Fair Employment and Housing (DFEH) within one (1) year from the alleged date of harm for the purpose of filing an administrative complaint with the DFEH. Any person claiming to be aggrieved by an alleged unlawful practice may file an administrative complaint with the DFEH.[86] The DFEH is statutorily granted a period of one (1) in which to conduct its investigation into the employee's allegations. If the DFEH concludes that sufficient evidence has been gathered to prove that a violation of the FEHA or CFRA occurred, the case

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[83] California Code of Regulations, Title 2, sections 7297.0, subdivision (o), 7297.4, subdivision (a)(1)(A).)

[84] In that instance, it would be inequitable to require the employer to return an employee who took a CFRA-qualifying leave to work when similarly-situated employees who either did not have a serious health condition or did not exercise their right to CFRA leave did not continue in their employment.

[85] *Both* the job applicant or employee and the employer must engage in a good-faith interactive process to determine effective reasonable accommodation(s). The obligation is mutual and reciprocal.

[86] Government Code section 12960. The timely filing of an administrative complaint and exhaustion of administrative remedies is a prerequisite to filing a civil action for damages under the FEHA. (Gov. Code, § 12965, subd. (b).)

can be referred to its Legal Division for prosecution before the Fair Employment and Housing Commission (FEHC).

After a hearing before an administrative law judge, the FEHC has statutory authority to order the employer to:

- Cease and desist from engaging in the discriminatory practice;
- Hire, reinstate or transfer the complaining job applicant or employee;
- Provide training for all of its employees, including supervisors and managers, at the employer's expense on the rights and remedies afforded employers and employees under the FEHA and/or CFRA;
- Post a notice in a conspicuous location in the workplace for a specific period of time (usually one (1) year) stating that the employer violated the FEHA and/or CFRA and specifying the relief ordered by the FEHC;
- Pay actual and compensatory damages to the job applicant or employee for back pay, front pay, out of pocket costs, and emotional and physical distress; and
- Pay an administrative fine to the General Fund of the State of California.[87]

The combined total monetary damages that can be awarded by the FEHC for emotional distress damages and administrative fines is $150,000.00 per complainant per respondent.[88]

Alternatively, the case may be litigated in the Superior Court of California. Either party may elect to have a jury decide the outcome. The amount of damages that can be awarded by the court is unlimited and includes punitive damages (except if the defendant is a public entity) which are calculated with reference to the defendant's net worth.

V. Resources

For further information, contact the Department of Fair Employment and Housing at:

(800) 884-1684 Employment

(800) 233-3212 Housing

TTY (800) 700-2320

www.dfeh.ca.gov

[87] Government Code section 12970.
[88] Government Code section 12970, subdivision (a)(3).

WORKPLACE DISABILITY DISCRIMINATION: A Comparison of Applicable Statutes[1]			
	FEHA	**ADA**	**CFRA**
Employer Applicability	As to *discrimination*: Applies to any person regularly employing five (5) or more persons. As to *harassment*: Applies to any person regularly employing one (1) or more persons. Excludes nonprofit religious employers (except health care facilities and schools operated by religious entities.)	Applies to private employers with fifteen (15) or more employees, as well as state and local governments, regardless of size.	Applies to employers who directly employ fifty (50) or more part or full-time employees within seventy-five (75) surface transportation miles of the worksite where the employee requesting leave is employed.
Employee Eligibility Prerequisites	None. Applies to all job applicants and employees regardless of length of service or hours actually worked. The employer must prove that an asserted affirmative defense is applicable.	Applies to all *qualified* applicants and employees regardless of length of service or hours actually worked. The employee must prove that he or she can perform the essential functions of the job in question with or without reasonable accommodation.	Applies only to employees who, at the time leave commences, have completed at least twelve (12) months of service with the employer *and* actually worked at least 1250 hours during the twelve month period immediately preceding the leave.
Conditions Covered	Physical disability: Any physiological disease, disorder, condition, cosmetic disfigurement or anatomical loss that affects one or more body systems (neurological, immunological, musculoskeletal, sense organs, respiratory, speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin or endocrine) *and* limits a major life activity. Mental disability: Any mental or psychological	Any physical or mental impairment that substantially limits one or more major life activities. "Medical conditions" not separately defined. Refer to EEOC policy guidance to determine when cancer is considered a disability under the ADA.	A "serious health condition" makes the employee unable to perform the essential functions of his or her job. "Serious health condition" is defined as any illness, injury (including on-the-job injuries), impairment, or physical or mental condition that involves either: (1) inpatient care (i.e. overnight stay) in a hospital, hospice, or residential care facility; or (2) continuing treatment or supervision by a healthcare provider. *Excludes* pregnancy, childbirth, or related medical conditions. (Included in

[1] A discussion of Workers' Compensation is beyond the scope of this presentation, but employers and employees should bear in mind that they may have specific rights and responsibilities under that statutory framework, as well.

	disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or learning disabilities that limits a major life activity. <u>Medical condition</u>: Any health impairment related to a diagnosis of cancer or record or history of cancer. Also includes "genetic characteristics," i.e. identifiable genes or chromosomes associated with a statistically increased risk of development of a disease or disorder.		FMLA.)
History or Perception	Disability also includes: (1) having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, health impairment or mental or psychological condition that is known to the employer; (2) being regarded or treated by the employer as having, or having had, any physical or mental condition that makes achievement of a life activity difficult; or (3) being treated or regarded by the employer as having, or having had, a disease, disorder, condition, etc., that has no present disabling effect but may become a physical or mental disability in the future.	Also covered under the ADA are: (1) a record of any physical or mental impairment that substantially limits one or more major life activities; and (2) being regarded as having any physical or mental impairment that substantially limits one or more major life activities.	History or perception of serious health condition not a protected basis. Employee must suffer from an actual serious health condition to qualify for CFRA leave. Employer may require certification from employee's health care provider that the employee has a medical condition that constitutes a "serious health condition." Employer prohibited from requiring disclosure of *specific* health condition for which the employee requests leave.
"Limits" v. "Substantially Limits"	Requires that a disability "limit" a major life activity *not* "*substantially* limit." A disability "limits" a major life activity if it makes the achievement of the life activity difficult. The California Legislature intended this distinction to result in broader coverage under the FEHA than	Requires that a disability "*substantially* limit" one or more major life activities. "Substantially limited" means: (1) unable to perform a major life activity that the average person can perform; or (2) significantly restricted as to the condition, manner or duration under which	Not applicable.

	under the ADA.	an individual can perform a particular major life activity as compared to the average person.	
"Working" as a Major Life Activity	"Working" is a major life activity regardless of whether the actual or perceived working limitation implicates a particular employment or a broad range or class of employments.	Employee must be significantly restricted in the ability to perform either a class of jobs or broad range of jobs. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.	"Major life activity" analysis not applicable. However, a qualified employee is entitled to CFRA leave if the serious health condition makes the employee unable to perform the essential functions of his or her particular job.
Mitigating Measures	"Limits" is determined without regard to any mitigating measures (such as medications, assistive devices, prosthetics or reasonable accommodation) unless the mitigating measure itself limits a major life activity.	"Substantially limits" is determined by considering both the positive and negative effects of mitigating measures used by the individual. If a person has little or no difficulty performing any major life activity because he or she uses a mitigating measure, that person is not a person with a "disability" as defined by the ADA.	Not applicable.
Essential Job Functions	Fundamental job duties of the employment position the individual with a disability holds or desires. Marginal job functions not included in definition. Employees and applicants not required to prove ability to perform essential job functions as element of prima facie case. Employer may introduce evidence of inability to perform essential job functions as affirmative defense.	Fundamental job duties the applicant or employee must be able to perform, with or without accommodation. Applicant or employee has burden to prove that he or she is able to perform the essential functions of the job in question.	A qualified employee is entitled to CFRA leave if the serious health condition prevents the employee from performing the essential functions of his or her job. "Essential functions" mean fundamental job duties of the employment position the individual with a disability holds, not the marginal job functions.
Reasonable Accommodation	Unless the employer can demonstrate that an accommodation would impose an undue hardship to its business operation, an employer is *required* to provide a reasonable accommodation once it has been established that an applicant or employee	An employer is *required* to make a reasonable accommodation for the known disability of a qualified applicant or employee if it would not impose an undue hardship on the operation of the employer's business.	Not applicable.

	has a disability under the FEHA.		
Leave of Absence	Employee entitled to a finite leave of absence as a reasonable accommodation if it is expected the employee will resume his/her duties when the leave concludes. Can constitute a violation of the statute if employer forces employee to take leave when employee can perform the essential functions of his/her job.	An employee who needs leave related to his or her disability is entitled to such leave if there is no other effective accommodation and the leave will not cause undue hardship.	Twelve (12) unpaid workweeks of leave in a 12-month period. Allows leave to be taken on an intermittent or reduced schedule basis.
Reassignment to a Vacant Position	Absent undue hardship, required when an employee with a disability can no longer perform the essential functions of his/her position and a vacant position for which he/she is qualified exists. Burden is on the employer to identify and offer suitable vacant positions.	Absent undue hardship, an employer must reassign an employee who is no longer qualified to return to his/her original position to a vacant position for which he or she is qualified. Appropriate only after it has been determined that: (1) no effective accommodations exist that will enable the employee to perform the essential functions of his or her current position; or (2) all other reasonable accommodations would impose an undue hardship.	Employer may require employee who needs intermittent leave due to foreseeable, planned medical to transfer temporarily to an available alternative position if : (1) the alternative position better accommodates recurring periods of leave than the employee's regular position; (2) the employee is qualified for the alternative position; and (3) the alternative position has equivalent pay and benefits.
Interactive Process	Employers required to engage in a timely, good faith interactive process with applicants or employees to determine effective reasonable accommodation. Failure to engage in the interactive process is a separate violation.	Flexible, interactive process that involves both the employer and the individual with a disability. Failure to engage in the interactive process is substantial evidence of an unlawful failure to accommodate, not a separate violation.	No requirement to engage in the interactive process.
Undue Hardship	Action requiring significant difficulty or expense. Burden is on employer to prove that a proposed accommodation would impose an undue hardship.	Applicability of defense generally the same as under the FEHA.	Not a defense.
Reinstatement	Absent undue hardship or an inability to perform the essential functions of the	Absent undue hardship, a qualified employee is entitled to return to his or	Guaranteed right to reinstatement to same or comparable position at the

	job, employee must be returned to his or her same pre-leave position.	her same pre-leave position.	conclusion of the leave (unless employee is a “key employee” and reinstatement would result in substantial and grievous economic injury).